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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ONEBEACON AMERICA INSURANCE COMPANY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; ITT CORPORATION AND GRINNELL, LLC, Real Parties in Interest.	B218321 (Super. Ct. No. BC290354)

Petition for Writ of Mandate, Certiorari. Peter D. Lichtman, Judge. Petition granted.

Selman Breitman, Jeffrey C. Segal and Iiya A. Kosten, for Petitioner.

No appearance on behalf of Respondent.

Morgan, Lewis & Bockius, Thomas M. Peterson and Michel Y. Horton, for Real Parties in Interest.

I. INTRODUCTION

Defendant, OneBeaconAmerica Insurance Company, has filed a mandate, certiorari and prohibition petition challenging the respondent court's July 31, 2009 order granting the summary adjudication motion of plaintiffs, ITT Corporation, formerly known as Grinnell Corporation and Grinnell LLC formerly known as Grinnell Corporation and Grinnell Fire Protection Systems Company, Inc. The summary adjudication order requires defendant to provide separate counsel to plaintiffs in asbestos suits. We issue our writ of mandate.

II. FOURTH AMENDED COMPLAINT

The fourth amended complaint alleges International Telephone and Telegraph Corporation became ITT Corporation. ITT Corporation is alleged to be the parent corporation of Grinnell Corporation which was later known as ITT Grinnell. Grinnell Fire Protection Systems Company, Inc. was sold to Tyco Laboratories in 1976. When the fourth amended complaint was filed, "Grinnell Corporation" was no longer owned by ITT Corporation. Defendant is the successor to Employers Liability Assurance Corporation and Commercial Union Insurance Company. The fourth amended complaint alleges that numerous policies issued by Employers Liability Assurance Corporation and Commercial Union Insurance Company provided coverage in the underling asbestos suits. Policy Nos. E15-9200-004 and E15-9200-024 issued by Commercial Union Insurance Company are alleged to provide coverage in the underlying asbestos suits. The fourth amended complaint contains causes of action against Commercial Union Insurance Company for: contract breach (first); implied covenant breach (second); tortuous contract breach (third); and declaratory relief (fourth). On the first three causes of action, plaintiffs sought damages. On the two tort-based claims in the second and third causes of action, plaintiff also sought exemplary damages. As to the fourth cause of action for

declaratory relief, plaintiff sought a declaration that defendants had a duty to defend. On all the causes of action, plaintiffs requested injunctive relief and other declarations that: plaintiffs are not involuntarily required to allocate defense costs; plaintiffs are not required to pay deductibles or self-insured retentions as long as there is available insurance; liability under the policies arise from an '"occurrence"'; "'continuous injury' trigger" rules apply to the underlying asbestos suits; plaintiffs may determine which policy applies when multiple policies provide coverage; plaintiffs are not liable to pay defense and indemnity costs for claims covered by insolvent insurers so long as there are available insurance policies; insurance companies '"sitting' above" an insolvent insurer be required to '"drop down'" as the initial carrier is unable to pay defense and indemnity costs; and a primary insurer may not declare its policies are exhausted when disputed by plaintiffs without court review. The fourth amended complaint makes no reference to the right to independent counsel.

III. POLICIES

There are two policies at issue. The first policy is Employers Liability Assurance Corporation policy No. CL E15-9200-004 which provided coverage from January 1, 1966, to January 1, 1969. Policy No. CL E15-9200-004 was a primary policy. An endorsement defines the insured as: "Grinnell Corporation and any and all companies, corporations and other business entities now or hereafter during the policy period owned, operated, or controlled by, or subsidiary to the aforementioned corporation, or as interests appear provided more than a 50% interest is owned by Grinnell Corporation." The coverage clause in Employers Liability Assurance Corporation Policy No. CL E15-9200-004 states, "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of [personal injury], sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by

[an occurrence]." The insurer was obligated to provide coverage for prescribed occurrences and pay the costs of defense and any judgment.

The second policy is policy No. E15-9200-024 issued by Employers Liability Assurance Corporation. Policy No. E15-9200-024 provided coverage between January 1, 1969, and January 1, 1972. Policy No. E15-9200-024 is a primary policy. The named insured is the same as in policy No. CL E15-9200-004. (Tab 7, p. 580) For our purposes, the coverage provisions of the two policies are the same. And Employers Liability Assurance Corporation is defendant's predecessor in interest.

IV. EVIDENCE

A. Corporate Structure

Beginning in 1969, during the policy periods, a merger agreement was entered into involving International Telephone and Telegraph Corporation. ITT Grinnell Corporation was a wholly subsidiary of International Telephone and Telegraph Corporation. The agreement contemplated the merger of Grinnell Corporation and ITT Grinnell Corporation. The merger was effective October 31, 1969. The surviving entity would be known as Grinnell Corporation. On August 1, 1969, the United States Department Justice filed an anti-trust suit. (*United States v. International Tel. & Tel. Corp.* (D.Conn. 1969) 306 F.Supp. 766, 770.) On October 31, 1969, the federal district court issued a preliminary injunction which contained a "hold separate" order. The federal court "hold separate" order required "ITT" to keep its "Grinnell operations" separate from its other functions. (*Id*. at p. 798.) On September 24, 1971, while the policy No. E15-9200-024 was in effect, the "hold separate order" terminated and was replaced by a final judgment. On September 24, 1971, the final judgment required "ITT" to '"spin off"' the '"Fire Protection Division of Grinnell" which was defined as, "'The assets and operations of Grinnell Corporation and any of its subsidiaries related to the manufacture of automatic sprinkler devices [or] the fabrication, installation or sale of automatic sprinkler systems."'

The separate subsidiary was incorporated on November 5, 1971, as Grinnell Fire Protection Systems Company, Inc. On February 14, 1986, the name of Grinnell Fire Protection was changed to Grinnell Corporation. On December 20, 2006, Grinnell Corporation was converted to a Delaware limited liability corporation and renamed Grinnell LLC.

B. Underlying Asbestos Lawsuits

As of August 31, 2008, plaintiffs or their related corporate entities who may or may not be covered by the two Employers Liability Assurance Corporation policies had been sued in 40,632 lawsuits. Further, plaintiffs had paid $17,745,503 to settle asbestos-related suits. There had been 248 asbestos suits settled in California which resulted in the payment of $16,984,003. Plaintiffs have paid more than $18 million in defense costs including over $11 million in California. Additional sums had been incurred in defense costs in Rhode Island. In support of their summary judgment or adjudication motion, plaintiffs cited to five lawsuits. In these lawsuits, Grinnell Corporation, Grinnell Fire Protection Systems, Grinnell Company of the Pacific, ITT-Grinnell, and Tyco Flow Control, Inc. individually and as the successor in interest to ITT Grinnell Valve Corporation formerly known as Grinnell Corporation have been sued.

C. Coverage Dispute

On December 6, 2006, defendant served a reservation of rights letter, signed by Senior Claims Specialist Edward Albanese, on plaintiffs' counsel, Paul Zevnik of the law firm of Morgan, Lewis & Bockius. Mr. Albanese's December 6, 2008 letter stated, among other things: International Telephone and Telegraph Corporation may not have tendered all pending cases; thus, defendant reserved the right to amend the reservation of rights letter once the untendered claims were reviewed; there was confusion in

determining the insured under the policies because of the "similar names of the new company and the older company"; it reserved the right to deny coverage which did not occur during the Employers Liability Assurance Corporation pay periods; it would only pay for a portion of a claim which was consistent with the limited coverage period; and it reserved all rights under the "policies" issued to Grinnell Corporation. Mr. Albanese set forth his understanding of the Grinnell Corporation related companies and requested that plaintiff's counsel provide any additional information on the subject. Mr. Albanese stated that defendant was negotiating with other primary insurers but if no agreement could be reached it would take control of the asbestos suits. The only policy defendant was aware of that provided coverage was policy No. CL E15-9200-004. However Mr. Albanese stated "secondary evidence" had been provided about policy No. E15-9200-024 but he could not confirm coverage existed under that policy. Mr. Albanese stated: "We understand Tyco may also claim rights to defense and/or indemnity under the same [Employers Liability Assurance Corporation] policy or policies for theses same or similar claims. [Defendant] will assess all claims under the policy or policies in order to equitably and reasonably pay claims covered by the policy or policies. We further understand Tyco and [International Telephone and Telegraph Corporation] entered into an agreement or agreements that may have altered or confirmed their respective obligations for these or other asbestos claims." Mr. Albanese indicated defendant reserved the right to seek a judicial determination of its rights and obligations in the asbestos litigation.

Mr. Albanese's letter acknowledged that plaintiffs were represented by the law firm of Morgan, Lewis & Bockius. Mr. Albanese indicated defendant would not pay the rates charged by the Morgan, Lewis & Bockius law firm. Mr. Albanese stated: "The rates charged by the Morgan Lewis firm to defend Grinnell are not 'reasonable' and far exceeds the rates [defendant] pays to defend similar asbestos bodily injury claims in theses jurisdictions. [Defendant] will not pay the Morgan Lewis rates. [Defendant] will reimburse the reasonable and necessary amounts incurred by the Morgan Lewis firm up

to the transition of the files to new defense counsel at the rates [defendant] usually pays for defense of asbestos cases." Mr. Albanese advised defendant of its right to seek review of defendant's coverage position with the Consumer Affairs Division of the California Department of Insurance. In plaintiffs' summary judgment motion, they asserted that defendant's 13 affirmative defenses in its answer constituted a reservation of rights.

On July 20 or 27, 2007, a claims adjuster, Meredith Glynn, wrote Robert White, a partner in the Morgan, Lewis & Bockius firm. She indicated the total amount billed to defendant was $6,260,349. Ms. Glynn wrote: "Our understanding is that, consistent with prior practice, Morgan Lewis has always billed [defendant] and other carriers each 100% of this and prior claimed amounts. Morgan Lewis has been billing each such carrier 100% of defense costs, despite [its] client's significant prior recovery of some unknown portion of such costs from other insurers." As will be noted, on July 29, 2007, defendant paid the Morgan, Lewis & Bockius law firm $564,716.

On several occasions, in 2007 and in its opposition separate statement, defendant admitted that it had a duty to pay defense costs for qualified insureds. On February 20, 2008, Ilya A. Kosten, defendant's counsel, wrote plaintiff's attorneys. According to Ms. Kosten, her client was willing to pay "100% of post-tender reasonable unreimbursed past defense costs" in behalf of Grinnell Corp. According Ms. Kosten, the date of tender was March 1, 2006. On July 29, 2007, defendant made a payment for costs "incurred by Grinnell" defending asbestos suits in the sum of $564,716. The payment documents referred to "overdue" invoices. On March 17, 2008, defendant paid $307,822.57 in "paid and billed" defense costs and $694,994.17 in indemnity costs. Because other policies contributed to the calculation of defense and indemnity costs, Ms. Kosten indicated that her client was willing to negotiate further past amounts in dispute and other issues. Later in 2008, defendant admitted it had a duty to pay defense costs. On or about January 26, 2009, defendant paid an additional $234,246.68 as reimbursement for defense of "Grinnell" asbestos suits.

V. CHALLENGED ORDER

There are two aspects to the respondent court's summary adjudication order. First, the July 31, 2009 order requires defendant to pay legal costs incurred in the defense of asbestos suits filed against plaintiffs. In terms of the duty to pay defense and indemnification costs, the order states: "[Defendant], formerly known as Commercial Union Insurance Company, and before that as the Employers Liability Assurance Corporation . . . shall reimburse otherwise unreimbursed defense costs paid and incurred by a Grinnell-related entity on or after March 1, 2006, for asbestos bodily injury lawsuits, arising from asbestos-containing products allegedly manufactured, sold, supplied or distributed by a Grinnell-related entity (the 'Grinnell asbestos suits'), where such bodily injury or exposure to asbestos is alleged to have taken place prior to or during the period of either of [defendant's] primary policies in effect (i) January 1, 1966 to January 1, 1969 ([Employers Liability Assurance Corporation] Policy No. E15-9200-004) and (ii) January 1, 1969 to January 1, 1972 [Employers Liability Assurance Corporation] Policy No. E15-9200-024) (collectively, 'the Grinnell Primary Policies') or where such suits do not specify the dates of bodily injury (including exposure to asbestos.")

Second, the respondent court declared plaintiffs are entitled to independent counsel with the litigation being controlled by them in all asbestos cases implicating a defense duty arising from the two insurance policies. The summary adjudication order specifies that defendant is to allow, apparently, plaintiffs to select independent counsel because of a potential conflict of interest: "As a result of the actual, material conflict of interest resulting from [defendant's] reservation of its rights, [defendant] owes a duty to allow Grinnell to select independent counsel pursuant to Civ. Code § 2860." The order further specified the exact policy language in the two Employers Liability Assurance Corporation policies which identified the insureds.

VI. DISCUSSION

A. Adequacy of Legal Remedy

Plaintiffs contend that defendant has an adequate remedy by appeal from a final judgment. The case against defendant is awaiting the commencement of the second phase trial. We previously denied defendant's mandate petition seeking to challenge the findings made at the first phase of the trial. (*OneBeacon America Insurance Company v. Superior Court* (Oct. 7, 2009, B219269) [nonpub. order].) Acting now could potentially increase the accuracy of the fact finding in the ongoing trial. As to the adequacy of the legal remedy, the order under review places substantial burdens on defendant, an insurer with an obligation to set and maintain reserves. Waiting for several years to resolve the present issue in a lawsuit that has already been pending for over six and one-half years serves little purpose. And the issuance of our alternative writ of mandate indicates we have concluded defendant has no adequate legal remedy. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205; *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1037.)

B. The Merits

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, our Supreme Court described a party's summary adjudication motion burdens as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof . . . [¶] [T]he party moving

for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact . . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted, see *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) We review the respondent court's decision to grant the summary judgment motions de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, disapproved on another point in *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 853, fn. 19.) The respondent court's stated reasons for granting the summary judgment motions are not binding on us because we review its ruling not its rationale. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196; *Dictor v. David & Simon, Inc.* (2003) 106 Cal.App.4th 238, 245.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, superseded by statute on a different point as stated in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768.) Those are the only issues a motion for summary judgment must address. (*Turner v. Anheuser-Busch, Inc., supra,* 7 Cal.4th at p. 1252; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

Generally, the insurer with a defense duty has the right to control the defense and settlement of litigation. (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1407; *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1428-1429.) However, there may be a right to independent counsel and the right to control the litigation on the part of the insured when there is an actual or potential conflict of interest. (Civ. Code, § 2860, subd. (a)[1]; *Long v. Century Indemnity*

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1 Civil Code section 2860, subdivision (a) states: "(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises

Co. (2008) 163 Cal.App.4th 1460, 1468.) The mere fact that the insurer serves a reservation of rights letter does not by itself trigger the duty to provide independent counsel to the insured. (*Id*. at p. 1471, fn. 10; *James 3 Corp. v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093, 1108-1109.) And not every conflict of interest gives rise to the insured's right to independent counsel. (*James 3 Corp. v. Truck Ins. Exchange*, *supra*, 91 Cal.App.4th at p. 1101; *Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713.) Civil Code section 2860, subdivision (b) states in part: "For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage. . . . No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits." The conflict must be significant and actual and not merely theoretical or potential. (*City of Huntington Beach v. Petersen Law Firm* (2002) 95 Cal.App.4th 562, 568, fn. 2; *Dynamic Concepts, Inc. v. Foremost Ins. Co.* (1998) 61 Cal.App.4th 999, 1007.) The Sixth Appellate District detailed scenarios where conflicts may arise: "Some of the circumstances that may create a conflict of interest requiring the insurer to provide independent counsel include: (1) where the insurer reserves its rights on a given issue *and* the outcome of that coverage issue can be controlled by the insurer's retained counsel [citation]; (2) where the insurer insures both the plaintiff and the defendant [citation]; (3) where the insurer has filed suit against the insured, whether or not the suit is related to the lawsuit the insurer is obligated to defend [citation]; (4) where the insurer pursues settlement in excess of policy limits without the insured's consent and leaving the insured exposed to claims by third parties [citation]; and (5) any other situation where an attorney

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which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section."

who represents the interests of both the insurer and the insured finds that his or her 'representation of the one is rendered less effective by reason of his [or her] representation of the other.' [Citations.]" (*James 3 Corp. v. Truck Ins. Exchange*, *supra*, 91 Cal.App.4th at p. 1101; see *Spindle v. Chubb/Pacific Indemnity Group*, *supra*, 89 Cal.App.3d at p. 713.)

The key element when the right to independent counsel arises is when there has been a reservation of rights and the outcome of the coverage issue can be controlled by counsel retained by the insurer. (Civ. Code, § 2860, subd. (b) ["[W]hen an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist."]; *Royal Surplus Lines Co., Inc. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193, 201-202; *Long v. Century Indemnity Co.*, *supra*, 163 Cal.App.4th at p. 1468.) One commentator has explained the issue thusly: "Simply put, the question is whether the *manner* in which the liability action is defended can *predetermine the outcome* of any subsequent coverage determination. [See *Gafcon, Inc. v. Ponsor & Assocs.*[, *supra*, 98 Cal.App.4th at p. 1423]—insurer seeking summary judgment must show appointed counsel '*could not impact coverage* by the manner in which they defended the case']." (Croskey & Kaufman, Cal. Practice Guide: Insurance Litigation (The Rutter Group, rev. #1 2009) ¶ 7:774, p. 7B-94.2.) The Court of Appeal has explained the case by case nature of conflict of interest analysis: "The potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled (such as by a defense based on total nonliability) or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured. As the court noted in *Native Sun Investment Group v. Ticor Title Ins. Co.*[(1987)] 189 Cal.App.3d [1265,] 1277, insurer-appointed defense counsel may obviate any *potential* conflict involving uncovered claims by """proceed[ing] diligently to litigate the matters that he was charged with on behalf of his client [the insured]. At no time, the court finds, did [appointed counsel] prefer the

[insurer's] interest to those of his client, [the insured], nor did he allow questions of coverage-though he was informed of them-to interfere with his litigation decisions regarding the third party claims.'"" (*Dynamic Concepts, Inc. v. Truck Ins. Exchange*, *supra*, 61 Cal.App.4th at pp. 1007-1008.)

Here, the unprecedented order of the respondent court requires in every case, including those which have not even been filed or even where the person exposed to asbestos is not yet ill, that plaintiffs be permitted to select independent counsel and control the litigation. Plaintiffs' limited evidentiary showing fails to identify a single case where defendants' reservation of rights will cause assigned counsel to defend in fashion which predetermines the outcome of the present coverage action. More critically, it is impossible to predict that every case in the future will require, as a matter of law, independent counsel. The issue of whether the outcome of the coverage issue can be controlled by counsel retained by the defendant is not proven in plaintiffs' separate statement. Plaintiffs have not developed the facts necessary to make a determination stage that the outcome of the coverage issue has been or can be controlled by counsel retained by the insured in any single case much less in all cases which are being litigated or ever will be filed. It bears emphasis that the right to independent counsel depends on a "careful analysis of the parties' respective interests to determine whether they can be reconciled (such as by a defense based on total nonliability)" and the evidence presented here does not permit that in terms of past, present and future litigation. (*James 3 Corp. v. Truck Ins. Exchange*, *supra*, 91 Cal.App.4th at p. 1107; *Dynamic Concepts, Inc. v. Truck Ins. Exchange*, *supra*, 61 Cal.App.4th at pp. 1007-1008.)

So there is no question, we believe the respondent court carefully analyzed the parties' respective interests to determine whether they were reconcilable. We respectfully disagree with the respondent court's ruling, not its efforts to reach the correct result. As noted, plaintiffs never presented substantial evidence of a single case where the reservation of rights would cause assigned counsel to defend in fashion which predetermines the outcome of the present coverage action. And in terms of the unfiled

cases including those where the future plaintiff has not yet contracted asbestosis, no careful analysis can be made of the relevant conflicts of interest.

VII. DISPOSITION

The mandate petition is granted. Upon remittitur issuance, the respondent court is to set aside its July 31, 2009 order granting the summary adjudication motion. The respondent court is to then issue an order denying the summary adjudication motion. Defendant, OneBeaconAmerica Insurance Company, is to recover its costs incurred in connection with these extraordinary writ proceedings from plaintiffs, ITT Corporation, formerly known as Grinnell Corporation and Grinnell LLC formerly known as Grinnell Corporation and Grinnell Fire Protection Systems Company, Inc.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.